

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CHESTER THOMAS</b>	)	
Claimant	)	
VS.	)	
	)	
<b>CITY OF WICHITA</b>	)	Docket Nos. 170,574
Respondent	)	& 192,834
Self-Insured	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent and the Kansas Workers Compensation Fund appeal the Award dated February 20, 1998, and the Nunc Pro Tunc Of An Award dated February 23, 1998, of Administrative Law Judge Nelsonna Potts Barnes wherein claimant was awarded a 55 percent work disability. Oral argument was held December 11, 1998, in Wichita, Kansas.

**APPEARANCES**

Claimant appeared by his attorney, Stephen J. Jones of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Edward D. Heath, Jr., of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Vincent L. Bogart of Wichita, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record and stipulations as set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. In addition, the parties agreed at oral argument that the issue dealing with whether the Administrative Law Judge properly granted claimant an extension of his terminal date in order to present additional evidence has been withdrawn as an issue and is no longer before the Appeals Board for consideration.

**ISSUES**

What is the nature and extent of claimant's injury and disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The parties have stipulated that claimant suffered accidental injury on August 12, 1992, which arose out of and in the course of claimant's employment with respondent. A claim from an earlier accident on October 7, 1990, has been consolidated with this action and the parties agree that an award based upon only one date of accident is appropriate in this matter.

Claimant suffered injury on the date alleged while trying to lift a large heart attack patient. At that time, claimant's arm gave way and he fell to the floor with the patient, suffering injury to his neck, shoulder and arm. Respondent and the Fund contend claimant's injury is limited to his right upper extremity. Claimant, on the other hand, alleges the injury is more significant, involving his neck, shoulder and arm.

Claimant was referred to Dr. Janice Mullinix, a board certified neurologist in Wichita, Kansas. She first examined claimant on August 21, 1992, as a referral from the treating physician, Dr. Thomas Billings. Dr. Mullinix treated claimant for a substantial period of time, with her last examination occurring in November 1994. During treatment, Dr. Mullinix did return claimant to light duty work, and respondent accommodated claimant's physical limitations for a period of time.

In January 1993, claimant met with James H. Bowen, Chief of Training and Safety Division for the Wichita Fire Department. Mr. Bowen acknowledged that claimant had been temporarily assigned to light duty after the August 1992 injury. On January 12, 1993, claimant and Mr. Bowen conferred regarding claimant's future status with the fire department and what, if any, options he may have had. As a result of that meeting, claimant terminated his employment with respondent on January 13, 1993. Claimant contends he was given the option of terminating his employment or being fired. Mr. Bowen denies advising claimant that he would be fired. However, Mr. Bowen does admit that claimant would be unable to work as a fire fighter with his restrictions, and the light duty job given to him was temporary at best.

Dr. Mullinix advised claimant should continue with the restrictions on a permanent basis. She opined that claimant should not be a fire fighter, as she felt the physical demands of the job exceeded his abilities. In Dr. Mullinix's chart note of October 6, 1992, there was an indication that claimant had already made a decision to terminate his employment, as he was unable to physically continue as a fire fighter. Respondent argues

claimant's actions in January 1993 were voluntary on claimant's part and should preclude his being entitled to a work disability under K.S.A. 1992 Supp. 44-510e. Claimant argues the termination was forced upon him and should not have any effect upon his rights to a work disability.

Respondent also contends claimant's ongoing upper extremity and cervical problems relate from a 1989 incident when claimant was swinging a baseball bat and injured his neck, right shoulder and right arm. However, claimant testified, and his testimony is uncontradicted, that he returned to work after the 1989 incident, and continued to perform his regular duties as a fireman.

Claimant was examined by Dr. Lawrence R. Blaty on April 15, 1994, at the request of his attorney. Dr. Blaty was provided the medical records of Dr. Brown, Dr. Stein, Dr. Mullinix, Dr. Lynch and Dr. Lesko, and also was provided medical notes, lab tests and other documentation indicating claimant's ongoing injury symptoms. The symptoms displayed by claimant indicated neck and right arm pain, and Dr. Blaty felt these were consistent with the type of injury described and how the injury occurred. Dr. Blaty limited claimant to 25 pounds lifting with the right arm occasionally, and recommended he avoid repetitive pushing/pulling activities with the right upper extremity, with a 25-pound push/pull limitation. He also recommended claimant avoid repetitive or prolonged flexion and extension activities with the neck, and limited him to occasional overhead reaching activities with his upper extremities. Dr. Blaty assessed claimant a 13 percent permanent partial functional impairment to the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). This included a 10 percent functional impairment to the right upper extremity, which converts to a 6 percent whole body impairment and a 7 percent whole body functional impairment to the neck. He opined 80 percent of claimant's functional impairment preexisted the 1992 injury.

Claimant was referred to Dr. James L. Gluck, a board certified orthopedic surgeon, at the request of the Administrative Law Judge for an independent medical examination on May 4, 1995. Dr. Gluck felt the 1992 accident did not cause any of claimant's cervical impairment, and any cervical impairment would have preexisted the 1992 incident. He did note the radiculopathy into the right upper extremity was exacerbated by the 1992 accident, but felt there was no permanent aggravation of claimant's cervical condition. He assessed claimant a 12 percent permanent partial impairment to the right upper extremity as a result of the August 12, 1992, accident.

Dr. Mullinix opined that claimant's 1992 accident did permanently aggravate his right upper extremity, neck and shoulder, but she declined to assess a numerical value to this increase in his functional impairment. She did opine that claimant would be incapable of returning to work as a fireman, but had no objection to claimant returning to work at light duty.

Mr. Bowen acknowledged that claimant would not be allowed to continue working as a fireman on light duty, and further agreed that the light duty job claimant was working was temporary only. He also acknowledged that no other type of employment within claimant's restrictions was ever offered to claimant before or after his termination of employment. While he and claimant did discuss claimant's options, these options were never articulated into the record, and the Appeals Board can only guess as to what may or may not have been discussed between the parties.

K.S.A. 1992 Supp. 44-510e defines the extent of permanent partial disability as being:

. . . the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment.

In reviewing the medical evidence, the Appeals Board is persuaded that claimant did suffer accidental injury to his right arm, shoulder and neck, and he is not limited to a scheduled injury. The opinions of Dr. Mullinix and Dr. Blaty are more persuasive than that of Dr. Gluck. In particular, Dr. Mullinix, as the treating physician, had the opportunity to examine claimant during a two-year plus period, seeing claimant on several occasions.

The Appeals Board finds Dr. Blaty's opinion that claimant has suffered a 13 percent permanent partial impairment of function to the body as a whole, based upon the AMA Guides to the Evaluation of Permanent Impairment, is the most credible opinion in the record. While Dr. Mullinix had the longest association with claimant, she elected not to provide a functional impairment for the Board's consideration. The Appeals Board finds that the opinion of Dr. Blaty most closely mirrors that of Dr. Mullinix regarding claimant's ongoing physical injuries and limitations.

Mr. Jerry Hardin and Mr. James Molski, both vocational experts well-known to the Appeals Board, provided opinions regarding claimant's loss of access to the open labor market and loss of ability to earn comparable wages. Mr. Hardin opined claimant's labor market access was in the 55- to 60-percent range. However, the Appeals Board notes Mr. Hardin was provided Dr. Blaty's restrictions only and was given no information regarding claimant's prior neck, shoulder and arm injuries. Mr. Molski was provided medical records to consider and was provided information regarding claimant's preexisting conditions. However, Mr. Molski was asked to consider not only the opinions of Dr. Blaty and Dr. Gluck, but also the opinion of Dr. Ernest Schlachter. Dr. Schlachter's deposition was never taken in this matter, and at the time his report was introduced at Mr. Molski's deposition, claimant timely objected to any consideration of Dr. Schlachter's opinion, based

upon a lack of foundation. The Kansas Supreme Court, in Roberts v. J.C. Penney Co., 263 Kan. 270, ¶ 5, 949 P.2d 613 (1997), held that opinions formed by vocational rehabilitation experts, relying upon evidence from non-testifying health care providers, are based on an insufficient foundation and are prohibited by K.S.A. 1992 Supp. 44-519. The Appeals Board, therefore, will not consider any portion of Mr. Molski's opinion influenced by the medical reports of Dr. Schlachter. Mr. Molski did, however, consider Dr. Gluck's and Dr. Blaty's reports and restrictions. Based upon Dr. Gluck's restrictions, he felt claimant had suffered a 20 to 25 percent loss of access to the open labor market. Based upon Dr. Blaty's limitations, he felt claimant has suffered a 30 to 35 percent loss of access to the open labor market. In considering the opinions of Mr. Hardin and Mr. Molski, and the credible medical evidence contained in the record, the Appeals Board finds claimant suffered a loss of access to the open labor market of 37.5 percent.

In considering what, if any, wage loss claimant may have suffered, the Appeals Board notes Mr. Hardin first compared claimant's post-injury wage to an average weekly wage of \$1,001. As the stipulated average weekly wage in this case is \$739.77, Mr. Hardin's opinion that claimant suffered a 72 percent loss of ability to earn comparable wages would be incorrect. However, Mr. Hardin did opine claimant had the ability to earn \$280 per week in the open labor market. When compared to claimant's above-stipulated average weekly wage, the Appeals Board finds claimant, based upon the opinion of Mr. Hardin, has suffered a loss of wage earning capacity of 62 percent. Mr. Molski, on the other hand, opined claimant suffered a wage loss of between 50 and 57 percent. When considering Mr. Molski's opinion and Mr. Hardin's opinion as corrected by the appropriate average weekly wage, the Appeals Board finds claimant has suffered a 57.75 percent loss of ability to earn comparable wages.

K.S.A. 1992 Supp. 44-510e(a) obligates the fact finder to consider both the loss of ability to perform work in the open labor market and the ability to earn comparable wages in computing a work disability. The statute gives no indication as to how much emphasis is to be placed upon either prong. It merely indicates that a balance of the two factors is required. In order to arrive at a percentage, a mathematical formula must be utilized. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990); Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409 (1991). The Appeals Board finds no justification in the record for placing greater emphasis upon one element of work disability over that of the other, and finds each should be given equal weight. The Appeals Board, therefore, finds claimant has suffered a 47.6 percent permanent partial work disability as the result of the injuries suffered on August 12, 1992, while working for respondent.

The Appeals Board finds that respondent's contention that claimant should be limited to a functional impairment, based upon the policy set forth by the Kansas Court of Appeals in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), does not apply to this situation. Claimant's contention

that he was forced to resign is more credible than that of respondent that claimant voluntarily terminated his employment. It is obvious that claimant was unable to continue work as a fire fighter, and the light duty job provided claimant was temporary. As no permanent full-time position was offered to claimant by respondent, the Appeals Board finds the policies set forth in Foulk do not apply to this circumstance.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated February 20, 1998, and the Nunc Pro Tunc Of An Award dated February 23, 1998, of Administrative Law Judge Nelsonna Potts Barnes should be, and are hereby, modified, and an Award is granted in favor of the claimant, Chester Thomas, and against the respondent, the City of Wichita, a self-insured, and the Kansas Workers Compensation Fund, for an accidental injury sustained on August 12, 1992, and based upon an average weekly wage of \$739.77.

Claimant is entitled to 415 weeks permanent partial disability compensation at the rate of \$234.77 per week, for a total award of \$97,429.55.

As of February 8, 1999, claimant is entitled to 338.71 weeks permanent partial general body disability at the rate of \$234.77 per week, totaling \$79,518.95, which is due and owing, and ordered paid to claimant in one lump sum minus amounts previously paid. Thereafter, claimant is entitled to 76.29 weeks permanent partial general body disability at the rate of \$234.77 per week, until the remaining balance of \$17,910.60 has been paid in full or until further order of the Director.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical benefits will be awarded upon proper application to and approval by the Director of the Division of Workers Compensation.

Claimant's contract for attorney fees is approved insofar as it is not in contravention to the provisions of the appropriate version of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Ireland Court Reporting	
Transcript of Regular Hearing	\$213.96

Deposition of James H. Bowen	\$218.26
Deposition of James T. Molski	\$183.91

## Barber &amp; Associates

Transcript of Motion Hearing	\$150.10
Deposition of James L. Gluck, M.D.	\$171.00
Deposition of Chester A. Thomas	\$527.00
Deposition of Jerry D. Hardin	\$295.20
Deposition of Lawrence R. Blaty, M.D.	\$244.20
Deposition of Janice M. Mullinix, M.D.	\$277.60
Deposition of Chester Thomas	\$175.00

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stephen J. Jones, Wichita, KS  
Edward D. Health, Jr., Wichita, KS  
Vincent L. Bogart, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director